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Supreme Court of the United States

OCTOBER TERM, A. D. 1955

No. 627

ELSIE S. FULLERTON,
Appellant,

vs.

CITY OF SCHENECTADY,
Appellee.

WALTER A. FULLERTON, JR.,
Appellant,

vs.

CITY OF SCHENECTADY,
Appellee.

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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We shall briefly call attention to certain errors appearing in appellee's brief:

a) At page 5, appellee states, "nor is it disputed that on November 13, 1951, the date of this accident, this local law was in force and effect."

That fact is disputed.

We argued this point at pages 11 to 12 of our Jurisdictional Statement and at page 12 of that brief stated:

> "It is appellants' claim that Schenectady's local law of 1935 was held invalid in the case of Hay-

ward v. City of Schenectady, 251 App. Div. 607, (decided 1937), and that, therefore, this local law had no force or validity on November 13, 1951, the date of Elsie Fullerton's accident (People v. Klinck Packing Co., 214 N. Y. 121, 140)."

b) At page 5, appellee quotes Article IX, Section 12 of the New York State Constitution which, so far as material, reads:

> "Every city shall also have the power to adopt and amend local laws not inconsistent with this constitution and laws of the state, * * *."

Our claim is that Local Law No. 6 of the City of Schenectady is inconsistent with the Fourteenth Amendment to the Constitution of the United States.

That claim is made particularly under headings 1, 3, 4 and 5 of our Jurisdictional Statement (pages 9-11, 13-19).

c) The case of MacMullen v. City of Middletown, 187 N. Y. 37 (Appellee's brief, page 9) is clearly distinguishable.

Judge Coon pointed out that distinction in his dissenting opinion in the Fullerton case, 285 App. Div. 545, 551. He said:

> "MacMullen v. City of Middletown (187 N. Y. 37), does not help us, because it involves the power of the State Legislature, not the power of a city legislative body—an entirely different matter." (Appellants' Jurisdictional Statement, page 29.)

d) The case of Ellis v. City of Geneva, 259 App. Div. 502, affd. 288 N. Y. 478 (Appellee's brief, page 9) is clearly distinguishable.

Again, Judge Coon in his dissenting opinion in the Fullerton case, 285 App. Div. 545, 551, distinguished the Ellis case. He said:

> "I do not regard Ellis v. City of Geneva (288 N. Y. 478), as controlling. The local law there involved was not as far-reaching as this one. In that case several grounds were urged for dismissal of the complaint, and it was dismissed. The Court of Appeals affirmed without opinion, and it may be regarded only as an affirmance of the result in that particular case."
> (Appellants' Jurisdictional Statement, pages 29, 30.)

The affirmance by the Court of Appeals, without opinion, simply means that that Court approved of the *result*. It does not mean that it approved of the reasoning of the Court below.

> Rogers v. Decker, 131 N. Y. 490, 493.
> Viertels v. New York, Ontario & Western R. Co., 182 App. Div. 92, 94.

A case is authority only for what is actually decided.

> O'Donoghue v. United States, 289 U. S. 516, 550.

e) At page 8, our opponent states:

"Appellee contends that the written notice, required by Local Law No. 6, was merely a condition precedent to the maintenance of an action against the City and *did not create anything new,* * * *."

And at page 10, appellee states:

> " * * * said requirement does not limit the duty of the city to maintain its streets in a reasonably

safe condition for use by the public, nor relieve the city of the consequences of its own negligence."

The conclusive answer to this contention is Judge Coon's dissenting opinion in the Fullerton case, 285 App. Div. 545, 550, 551. We quote:

"It would seem to need little to demonstrate that this local law does in effect offend the fundamental law of liability for torts. It not only abolishes the rule of constructive notice, it removes from consideration actual notice and actual knowledge, no matter how long standing. Though all the officers of the city admitted long-standing actual knowledge of the precise dangerous condition and long-standing opportunity to repair, liability is still dependent upon a written notice to a particular official. Thus the *only* accomplishment of the local law in such a case is to immunize the city from liability. I venture that no one would contend that a city has the power to enact a local law providing that it 'should not be liable for the negligence of its officers, agents or employees in relation to its streets.' If that cannot be done directly it cannot be done indirectly under the cover of any guise or subterfuge."

(Appellants' Jurisdictional Statement, pages 28 and 29.)

Even the majority opinion in the Appellate Division, 285 App. Div. 545, 548, makes this startling admission:

"I readily agree that local laws of the character involved here are in reality attempts to bar tort actions under the guise of a procedural require-

ment, and that they put upon many deserving litigants an impossible burden."
(Appellants' Jurisdictional Statement, page 25.)

f) At page 10, appellee states:

"If the state can lawfully enact a statute requiring prior written notice, a municipality may do likewise with the same force and effect, * * *."

Appellants claim appellee is in error for two reasons:

First. A State statute and a municipal ordinance do not stand on the same footing.

That appellee is in error is made clear by Judge Coon's dissenting opinion in the Fullerton case, 285 App. Div. 545, 550, when he said:

"Given their ordinary and accepted meaning, I cannot construe the words 'acquisition, care, management and use' [contained in Section 3, Article XII of New York Constitution, in effect at the time] as conveying any power beyond the necessary legislation to acquire and own the streets and regulate the use of them by the public and to prevent their misuse. 'The authority of a municipality to abrogate State law is never implied or inferred. It is only derived from express grant, never from a general grant of power. A State policy may not be ignored by a municipality unless it is specifically empowered to do so in terms clear and explicit.' (Jewish Consumptives' Relief Society v. Town of Woodbury, 230 App. Div. 228, 234, affd., 256 N. Y. 619; see, also, Matter of Kress & Co. v. Dept. of Health, 283, N. Y. 55)." (Appellants' Jurisdictional Statement, pages 27 and 28.)

This Court in Saia v. New York, 334 U. S. 558, was construing a city ordinance which was not narrowly drawn (page 560). This Court held Saia's rights were "protected by the Fourteenth Amendment against State action." (page 560)

This Court further said at page 562:

> "Courts must balance the various community interests in passing on the constitutionality of local regulations of the character involved here."

Second. A state can, within reasonable limitations, exonerate a municipality from liability.

It is against public policy for a municipality to release *itself* from liability.

We argued this point at pages 9 to 11 of our Jurisdictional Brief and do not repeat same here.

g) At page 11, appellee states that "the issues raised do not present a substantial federal question."

The Court of Appeals, however, stated in their amended decision:

> "Judgment affirmed, without costs. Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz: Whether plaintiffs have been deprived of property without due process of law under the Fourteenth Amendment of the Constitution of the United States; and whether Local Law No. 6 of the City of Schenectady, effective April 16, 1935, is repugnant to the Constitution of the United States. The Court of Appeals held that there was no denial of any constitutional right of the plaintiffs." New York Law Journal November 21, 1955, page 8.
>
> (Appellants' Jurisdictional Statement, page 40.)

This amended decision in the Fullerton cases is now officially reported in 309 N. Y. 855.

It seems to us that the language of the late Justice Rutledge (later of this Court) in President & Directors of Georgetown College v. Hughes, 130 F. 2d 810, 812, is precisely in point, when he said:

> "The cases are almost riotous with dissent. Reasons are even more varied than results. These are earmarks of law in flux. They indicate something wrong at the beginning or *that something has become wrong since then.* They also show that correction, though in process, is incomplete."

We respectfully submit that these cases present federal questions which should be reviewed by this Court.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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